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Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?

Robert Wintemute*

'Don't it always seem to go
That you don't know what you've got
'Til it's gone.'¹

I. Introduction

On 5 October 2016, Theresa May outlined her vision of the United Kingdom's future outside the European Union:²

Our laws made not in Brussels but in Westminster. Our judges sitting not in Luxembourg but in courts across the land. The authority of EU law in this country ended forever. ... [W]e are not leaving only to return to the jurisdiction of the European Court of Justice. ... We are leaving to become, once more, a fully sovereign and independent country.³

Will being 'a fully sovereign and independent country', free of EU anti-discrimination law and the Court of Justice of the EU (CJEU), be a good thing for the UK's women and minorities (defined by race, religion, disability, age or sexual orientation)? Would fewer women and members of minorities have voted to leave the EU, if they had understood the potential consequences for UK anti-discrimination law? In theory, the Equality Act 2010 for Great Britain (and similar legislation for Northern Ireland) provides all the protection against discrimination we need, because it meets the minimum requirements of EU law and goes beyond them in some areas. But can Theresa May and her successors be trusted to maintain this protection, once the UK Parliament is freed of the constraints of EU law?

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¹ Joni Mitchell, "Big Yellow Taxi", 1970, <https://www.youtube.com/watch?v=94bdMSCdw20> (last accessed 25 November 2016).

² I do not use the term 'Brexit', which implies misleadingly that the UK's leaving the EU is a quick, simple and cost-free process, like walking through a door or turning off the motorway. A better term would be 'Brivorce', which implies accurately that the process is likely to be long, complicated and expensive.

³ See <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html> (last accessed 25 November 2016).

This might be the case, given that she described the Conservative Party in the same speech as 'the party of workers', which will make sure that 'people are properly protected at work'. She added that she wants the UK to be 'a Great Meritocracy', 'a country where it doesn't matter where you were born, who your parents are, where you went to school, what your accent sounds like, what god you worship, whether you're a man or a woman, gay or straight, or black or white'. She expressed concern about disproportionate exclusion of black Caribbean schoolchildren, detention of black women under mental health legislation, and poverty in ethnic minority households, as well as the fact that white working class boys are the group least likely to go to university.⁴

But what if the historical ambivalence of the Conservative Party with regard to anti-discrimination legislation were to resurface, and inspire a 'Great Repeal Bill' to sweep away the Equality Act 2010 and other legislation seen as burdening UK businesses? What would we lose, because EU law would no longer prevent this from happening? Heeding Joni Mitchell's warning, we should know what we've got, ie, what EU anti-discrimination law has done for women and minorities in the UK, before it's gone.

II. How has EU law strengthened UK anti-discrimination law?

Since the UK joined the EU in 1973, EU legislation and CJEU judgments (interpreting EU legislation) have frequently required improvements to UK anti-discrimination law, both with regard to grounds introduced into UK law before EU law (race in 1965, sex in areas beyond pay in 1975, disability in 1995),⁵ and grounds introduced into UK law after EU law, to implement Directives adopted in 2000⁶ (religion, age, and sexual orientation).⁷

⁴ Ibid. But see <https://www.theguardian.com/law/2016/nov/07/doubts-cast-on-theresa-mays-pledge-to-protect-workers-rights-post-brexite> (last accessed 25 November 2016).

⁵ Race Relations Acts 1965, 1968, 1976; Equal Pay Act 1970 and Sex Discrimination Act 1975; Disability Discrimination Act 1995. The legislation cited in this article often applies only to Great Britain (England, Wales, and Scotland). When this is the case, there is separate legislation for Northern Ireland.

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 (19 July 2000), p. 22. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 (2 Dec. 2000), p. 16.

A. Equal pay

The Equal Pay Act 1970 (equal pay for men and women for ‘like work’ or ‘work rated as equivalent’) was partly inspired by the eventual need to comply with Article 119 of the 1957 EEC Treaty (‘the principle that men and women should receive equal pay for equal work’, now found in Article 157 TFEU), after the UK’s accession to the EU in 1973. In 1975, Directive 75/117/EEC extended the meaning of ‘equal work’ to include not only ‘the same work’ but also ‘work to which equal value is attributed’. The Equal Pay Act 1970 was therefore amended in 1983 to add the concept of work that is, ‘in terms of the demands made on [a woman] (for instance under such headings as effort, skill and decision), of equal value to that of a man’.⁸

B. Equal treatment: Sex, pregnancy, and sexual harassment

In the area of ‘equal treatment’ in employment (as opposed to ‘equal pay’ in employment), the UK’s Sex Discrimination Act 1975 (SDA) prohibited direct and indirect sex discrimination with regard to access to employment (hiring or promotion), dismissal, and working conditions (other than pay), before the EU’s Directive 76/207/EEC did so in 1976. However, because EU law allowed women in the UK to request references to the CJEU, they could challenge restrictions in UK legislation that limited their protection against sex discrimination. In *Marshall No. 1*,⁹ the CJEU held that Directive 76/207/EEC did not permit the SDA’s exception for retirement, which allowed employers to dismiss women at the age of 60, even though they let men work until they were 65.¹⁰ In *Marshall No. 2*, the CJEU went on to rule that the SDA’s upper limit of £6250 on damages ‘cannot ... constitute proper implementation of ... the Directive, since it limits ... compensation ... to a level which is not

⁷ Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006.

⁸ Equal Pay (Amendment) Regulations 1983.

⁹ Case 152/84 *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] ECR 723.

¹⁰ The application of the exception to dismissal was removed by the Sex Discrimination Act 1986, s. 2.

necessarily consistent with ... ensuring real equality of opportunity through adequate reparation for the loss ... sustained as a result of discriminatory dismissal'.¹¹

As for pregnant women, UK courts failed to protect them adequately against dismissals [PLURAL] or refusals to hire or promote them,¹² until the CJEU declared in *Dekker* in 1990 that 'only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex'.¹³ In *Webb*, the CJEU curtly dismissed the UK House of Lords' suggestion that a pregnant woman could be compared with an ill man,¹⁴ and later extended protection against dismissal from pregnant women hired for an indefinite period (*Webb*) to pregnant women employed on a series of fixed-term contracts.¹⁵ The CJEU also interpreted Directive 76/207/EEC in *Brown* as prohibiting dismissal due to pregnancy-related illness prior to maternity leave, no matter how long the illness lasts.¹⁶ When the UK Government complied with *Dekker*, by ending its policy of dismissing female members of the armed forces when they became pregnant, *Marshall No. 2* allowed women who had been dismissed to claim substantial compensation.¹⁷

Two further examples of how EU law has strengthened UK law against sex discrimination are the areas of sexual harassment and positive action. Until 2005, UK law contained no express definition or prohibition of sexual harassment, which had to be characterised as direct sex discrimination, and required a showing that a male comparator would not have been treated in the same way.¹⁸ A definition and an express prohibition were added to the SDA in 2005 to implement Directive 2002/73/EC.¹⁹ Similarly, before the

¹¹ Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, [30].

¹² See, eg, *Turley v. Allders Department Stores*, [1980] ICR 66 (EAT).

¹³ Case C-177/88, *Dekker*, [1990] ECR I-3941, [12].

¹⁴ *Webb v. EMO Air Cargo (No. 1)*, [1992] 4 All ER 929 (HL); Case C-32/93, *Webb v. EMO Air Cargo*, [1994] ECR I-3567; *Webb v. EMO Air Cargo (No. 2)*, [1995] 4 All ER 577 (HL).

¹⁵ Case C-109/00, *Tele Danmark A/S v. Brandt-Nielsen*, [2001] ECR I-6993

¹⁶ Case C-394/96, *Brown v. Rentokil*, [1998] ECR I-4185.

¹⁷ *Ministry of Defence v Cannock*, Employment Appeal Tribunal, 2 August 1994.

¹⁸ *Pearce v Mayfield Secondary School*, [2003] UKHL 34.

¹⁹ Employment Equality (Sex Discrimination) Regulations 2005.

Equality Act 2010, anti-discrimination legislation in Great Britain expressly outlawed positive action that takes the form of preferences for women or a minority in decisions about recruitment or promotion.²⁰ Influenced by EU law, the 2010 Act departs from this long UK tradition by allowing consideration of sex, race and other grounds in ‘tie-breaking’ situations, where two candidates for employment are equally well qualified and one is from an under-represented group,²¹ as the CJEU has done with regard to sex since 1997.²²

C. Gender reassignment

When a transgender woman was dismissed for undergoing gender reassignment, the Industrial Tribunal saw no prospect of protection under the SDA, but referred the question of protection under Directive 76/207/EEC to the Luxembourg Court. In 1996, the CJEU ruled in her favour, finding that the Directive’s prohibition of sex discrimination ‘precludes dismissal of a transsexual for a reason related to a gender reassignment’.²³ Although it was not necessary to amend the SDA, only to interpret it in light of the CJEU’s judgment, the UK chose to add the ground ‘gender reassignment’ to the SDA in 1999.²⁴ The CJEU provided further protection with regard to a survivor’s pension, before the Gender Recognition Act 2004 allowed a non-transgender female employee to marry her transgender male partner (they were both legally female at the time),²⁵ and with regard to a state pension, before the 2004 Act allowed a transgender woman to apply for a gender recognition certificate and qualify at the age of 60.²⁶ Most recently, the UK Supreme Court has sought the assistance of the CJEU in deciding whether or not a transgender woman may be required to divorce her

²⁰ *Londo n Borough of Lambeth v. Commission for Racial Equality*, [1990] IRLR 231 (EWCA); *Jepson v. The Labour Party*, [1996] IRLR 116 (IT).

²¹ Equality Act 2010, ss. 159(3)-(4).

²² C-409/95, *Marschall v Land Nordrhein Westfalen*, [1997] ECR I-6363.

²³ Case C-13/94, *P. v. S. and Cornwall County Council*, [1996] ECR I-2143, para 24.

²⁴ Sex Discrimination (Gender Reassignment) Regulations 1999.

²⁵ Case C-117/01, *K.B. v. National Health Service Pensions Agency*, [2004] ECR I-541.

²⁶ Case C-423/04, *Richards v. Secretary of State for Work and Pensions*, [2006] ECR I-3585.

wife and form a civil partnership with her, as the 2004 Act required before the Marriage (Same Sex Couples) Act 2013, in order to qualify for a state pension at the age of 60.²⁷

D. Sexual orientation

Although the CJEU declined in *Grant* in 1998 to interpret Directive 76/207/EEC on sex discrimination as protecting lesbian, gay and bisexual employees,²⁸ in the same way as it protects transgender employees, the European Commission and the Council of the EU came to the rescue. In late 1999, shortly after the Treaty of Amsterdam entered into force, they quickly exercised the new EU competence to combat discrimination based on sexual orientation (Article 13 TEC, inserted in 1997, now Article 19 TFEU), by proposing and adopting (unanimously as required by Article 13) Directive 2000/78/EC, which expressly prohibits discrimination based on sexual orientation in employment and vocational training. The EU introduced this binding legislation (which the UK Government chose not to veto) at a time when the UK Government had been proposing, within the UK, only non-binding codes of practice for discrimination based on sexual orientation and age, instead of new legislation similar to the SDA.²⁹

In 2005, while preparing for the coming into force of the Civil Partnership Act 2004 on 5 December 2005, the UK Government inserted into the Employment Equality (Sexual Orientation) Regulations 2003 an exception to the principle that less favourable treatment of same-sex civil partners, compared with different-sex spouses, would be direct discrimination based on sexual orientation. The exception, which is now found in the Equality Act 2010 (Schedule 9, Paragraph 18), permits occupational pension schemes (especially those in the private sector) to ignore contributions to the schemes made by lesbian and gay employees

²⁷ C-451/16, *MB v Secretary of State for Work and Pensions*, referred by [2016] UKSC 53.

²⁸ Case C-249/96, *Grant v. South-West Trains*, [1998] ECR I-621.

²⁹ See Written Answers (HL), 2 December 1999, Column WA51, <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo991202/text/91202w01.htm> (last accessed 25 November 2016): "The Government have already produced a code of practice on discrimination in employment based on age and propose ... preparing a code of practice on discrimination on the grounds of sexual orientation."

before 5 December 2005, when calculating the amount of a survivor's pension payable to a same-sex civil partner, even though they would give credit for identical contributions by a heterosexual employee with a surviving different-sex spouse. Insult was added to injury when the Marriage (Same Sex Couples) Act 2013 extended the Paragraph 18 exception to same-sex spouses.

In adding the very mean Paragraph 18 exception to equality for same-sex couples in 2005, the UK Government assumed that EU law would permit it. They were wrong. In *Maruko* in 2008³⁰ and *Römer* in 2011,³¹ the CJEU interpreted Directive 2000/78/EC as requiring equal pay (including pension or survivor's pension benefits) for employees with same-sex civil partners and employees with different-sex spouses, even though all of the employee's contributions in both cases were made before the 2003 deadline to implement the Directive. Citing *Maruko* and *Römer*, John Walker, who retired in 2003, challenged his private-sector employer's reliance on Paragraph 18 as permitting them (in the future) to refuse to pay to Mr. Walker's then civil partner (now his husband) the same survivor's pension that the employer would pay to Mr. Walker's wife, if he were to divorce his husband and marry a woman. The Employment Tribunal upheld his claim that Paragraph 18 is contrary to the Directive, but his employer appealed. The UK Government intervened on the side of the employer to defend Paragraph 18, and helped to persuade both the Employment Appeal Tribunal and the England and Wales Court of Appeal to hold that *Maruko* and *Römer* had no effect on Paragraph 18, and that a reference to the CJEU was not necessary.³²

The UKSC is scheduled to hear Mr. Walker's appeal on 8-9 March 2017. The UKSC should grant the appeal in *Walker*, or make a reference to the CJEU, which would almost certainly hold that *Walker* is indistinguishable from *Maruko* and *Römer*.

³⁰ Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, [2008] ECR I-1757.

³¹ Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, [2011] ECR I-3591.

³² See R. Wintemute, 'Unequal Same-Sex Survivor's Pensions: The EWCA Refuses to Apply CJEU Precedents or Refer', (2016) 45 ILJ 89, analysing [2015] EWCA Civ 1000.

If Mr. Walker's claim ultimately succeeds, and EU law requires that Paragraph 18 be set aside, his husband's EU law right to an equal survivor's pension could be snatched away, if the UK leaves the EU while Mr. Walker and his husband are both still alive. The UK's departure would mean that Directive 2000/78/EC, as interpreted in *Maruko* and *Römer*, would no longer protect UK employees with same-sex surviving civil partners or spouses, and would therefore permit the 'fully sovereign and independent' UK Government to revive Paragraph 18.³³

E. Religion or belief

In Northern Ireland, protection against discrimination because of 'religious belief' began with the Fair Employment (Northern Ireland) Act 1976. As of 2000, there was still no comparable protection in Great Britain, leaving the Roman Catholic, Hindu and Muslim minorities unprotected (except with regard to indirect discrimination under the Race Relations Act 1976, or with regard to acts of public authorities under the Human Rights Act 1998 from 2 October 2000). As in the case of the grounds 'gender reassignment' and 'sexual orientation', it was only as the result of EU action that the ground 'religion or belief' was added to Great Britain's anti-discrimination legislation, when the Employment Equality (Religion or Belief) Regulations 2003 implemented Directive 2000/78/EC.

To date, the CJEU has decided no cases regarding religion or belief that might raise standards in the UK. With regard to the accommodation of religious minority practices, the UK's standards are arguably already the highest in the EU, at least in the case of ethnic-religious minorities (Jews and Sikhs), and religious minorities that are disproportionately made up of members of ethnic minorities (Hindus in the UK being disproportionately of Indian origin, and Muslims disproportionately of Pakistani and Bangladeshi origin), and especially compared with those in France and Belgium. Since the House of Lords' landmark

³³ Instead of being set aside under EU law, paragraph 18 might be repealed, if the UK Supreme Court makes a declaration of incompatibility in *Walker* under s. 4 of the Human Rights Act 1998 and the UK Government complies with it.

1983 judgment in *Mandla v Dowell Lee*,³⁴ discrimination against non-Christian religious minorities in Great Britain has generally been prohibited as indirect racial discrimination, with claims of direct or indirect religious discrimination being added in 2003.

Indeed, religion or belief is an area in which the UK could help to raise standards in the other 27 EU member states, were it to remain in the EU. The potential of beneficial UK influence can be seen in the contrasting Opinions of the Advocates General in the first two religion or belief cases to reach the CJEU. In *Samira Achbita* (a case from Belgium), Advocate General Kokott (from Germany) proposed highly deferential review of an employer's ban on female Muslim employees wearing headscarves:

- 1) The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination ... under Article 2(2)(b) ...
- 2) Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard. In that connection, the following factors in particular must be taken into account:
 - the size and conspicuousness of the religious symbol,
 - the nature of the employee's activity,
 - the context in which she has to perform that activity, and
 - the national identity of the Member State concerned.³⁵

In *Asma Bougnaoui* (a case from France), Advocate General Sharpston (from the UK) reflects 'headscarf-friendly and turban-friendly' UK anti-discrimination law when she proposes a much more robust interpretation of EU law:

A rule ... which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of ... Directive 2000/78/EC ... nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays

³⁴ [1983] UKHL 7.

³⁵ Case C- 157/15, Opinion of 31 May 2016.

down applies. That is a fortiori the case when the rule in question applies to the wearing of the Islamic headscarf alone.³⁶

F. Age

Although no judgment of the CJEU to date seems to have imposed a higher standard on the UK than a UK court was willing to impose, it must not be forgotten that, but for Directive 2000/78/EC, implemented through the Employment Equality (Age) Regulations 2006, it is possible that a prohibition of age discrimination would still not have been introduced into UK anti-discrimination law.

G. Racial or ethnic origin

Since the Race Relations Act 1965, and with the exception of Northern Ireland before 1997,³⁷ the UK has been a leader in the EU in prohibiting racial discrimination. The detailed prohibitions of direct and indirect racial discrimination in the Racial Relations Act 1976 clearly influenced the drafting of Directive 2000/43/EC, the EU's first prohibition of racial discrimination. But even here, UK legislation has benefited from EU action. Three examples can be given.

First, the CJEU's *Marshall No. 2* judgment, which led to the removal of the cap on damages for sex discrimination,³⁸ inspired the UK Government to voluntarily remove the identical cap on damages for racial discrimination, even though EU law did not yet apply.³⁹ Second, the Race Relations Act 1976 contained no definition or prohibition of harassment on racial grounds before Directive 2000/43/EC, which was implemented through the Race Relations Act 1976 (Amendment) Regulations 2003. Third, the UK could benefit in future from the CJEU's 2015 *CHEZ* judgment, which held: (i) that an apparently neutral rule chosen intentionally because it would have a disproportionate impact on a particular racial or ethnic group (Roma persons) is direct racial discrimination, even though it affects members of other

³⁶ Case C- 188/15, Opinion of 13 July 2016.

³⁷ Race Relations (Northern Ireland) Order 1997.

³⁸ Sex Discrimination and Equal Pay (Remedies) Regulations 1993.

³⁹ Race Relations (Remedies) Act 1994.

racial or ethnic groups (non-Roma persons); and (ii) an individual does not have to be a member of the group experiencing the intentionally or unintentionally disproportionate impact of an apparently neutral rule to challenge it as direct or indirect racial discrimination (a non-Roma woman could challenge a rule targeting or disproportionately affecting Roma persons because it also affected her).⁴⁰

H. Disability

As in the area of racial or ethnic origin, the UK led the EU with its Disability Discrimination Act 1995 (DDA), and therefore influenced the drafting of Directive 2000/78/EC, the EU's first prohibition of disability discrimination. However, to implement the Directive, the DDA still had to be amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 to provide a clear prohibition of direct discrimination (which could not be justified), and a definition and prohibition of harassment of disabled persons. The Directive's prohibition of indirect disability discrimination, which was made optional to reflect the pre-existing structure of the DDA, was finally incorporated into the Equality Act 2010. As for the case law of the CJEU, the UK has benefited from judgments on discrimination against one person (a mother) because of the disability of another (her son),⁴¹ and on using the UN Convention on the Rights of Persons with Disabilities to interpret EU law.⁴²

III. Would the European Convention provide the same protection as EU law?

If the UK leaves the EU, discrimination by public authorities can still be challenged under the Human Rights Act 1998, and ultimately in the European Court of Human Rights (ECtHR). But what about the private sector? If the UK Government began to repeal parts of the Equality Act 2010, because they were no longer required by EU law, could an application to the ECtHR claim a breach of a positive obligation under Article 14 (and another Convention

⁴⁰ Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECR I-0000.

⁴¹ Case C-303/06 *Coleman v Attridge Law*, [2008] ECR I-5603.

⁴² Case C-335/11 *HK Danmark, acting on behalf of Jette Ring* [2013] ECR I-0000.

right, such as the Article 8 right to respect for private life)⁴³ to adopt legislation prohibiting certain forms of discrimination by private-sector actors?⁴⁴ In *Vriend v. Alberta*,⁴⁵ the Supreme Court of Canada found a positive obligation to legislate against sexual orientation discrimination, especially in the private sector. Similar reasoning from the ECtHR can be found in *Danilenkov v. Russia*:⁴⁶

123. ... the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership ...

136. ... the State failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership. ...

But will Theresa May one day renew her 25 April 2016 proposal that the UK should leave the European Convention on Human Rights, thereby stripping UK residents of their access, not only to the CJEU, but also to the ECtHR? She said:

The ECHR can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia’s when it comes to human rights. So regardless of the EU referendum, my view is this. If we want to reform human rights laws in this country, it isn’t the EU we should leave but the ECHR and the jurisdiction of its Court.⁴⁷

She retracted this proposal when she launched her bid for the leadership of the Conservative Party on 30 June 2016: ‘I’ve set my position on the ECHR out very clearly but I also recognise that this is an issue that divides people, and the reality is there will be no Parliamentary majority for pulling out of the ECHR, so that is something I’m not going to pursue [until there is one?].’⁴⁸

⁴³ On employment discrimination falling within the ambit of Article 8 (private life), see *I.B. v. Greece* (3 Oct. 2013); *Emel Boyraz v. Turkey* (2 Dec. 2014).

⁴⁴ There is no reason why the reference to a potential positive obligation in the Explanatory Report to Protocol No. 12 (paras 26-28) should not also apply to Article 14 when the facts fall within the ambit of another Convention right.

⁴⁵ [1998] 1 Supreme Court Reports 493.

⁴⁶ 30 July 2009.

⁴⁷ See <http://www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexite-full-text.html> (last accessed 25 November 2016).

⁴⁸ See <http://www.pinknews.co.uk/2016/06/30/theresa-may-ditches-plans-to-withdraw-from-human-rights-court-as-she-bids-to-be-pm> (last accessed 25 November 2016).

IV. Conclusion

Historically, the Conservative Party has rarely proposed new UK anti-discrimination legislation. The Race Relations Acts 1965, 1968 and 1976, the Equal Pay Act 1970, the SDA, the Regulations implementing Directives 2000/43/EC and 2000/78/EC, and the Equality Act 2010 were all introduced by the Labour Party. The main exception was the Disability Discrimination Act 1995, which required direct action by disability rights campaigners sufficient to embarrass John Major's Government into legislating.⁴⁹ Since 2010, the Conservative Party (with and without the Liberal Democrats) has chosen not to bring into force several sections of the Equality Act 2010,⁵⁰ and to repeal others.⁵¹ If the UK leaves the EU and the requirements of EU anti-discrimination law, it is not inconceivable that a business-friendly Conservative Government could one day propose the repeal of the entire Equality Act 2010, and its replacement by voluntary codes of practice.⁵² Inside the EU, the UK benefits from minimum anti-discrimination standards agreed by 28 countries. EU membership locks in most of the protections that the UK's women and minorities have fought to achieve since 1965, and prohibits regression by the UK Government and Parliament. Outside the EU, anything is possible. Perhaps a slogan for the Remain campaign should have been, with regard to anti-discrimination law: 'Let's go forward together, not backwards alone.'

⁴⁹ See <http://www.bbc.co.uk/programmes/articles/591HbNXpfSw1WFMkPN2fQcY/the-reunion-disability-campaigners-full-programme-transcript-10-april-2016> (last accessed 25 November 2016).

⁵⁰ Sections 1(socio-economic inequalities), 14 (combined discrimination).

⁵¹ Sections 40(2)-(4) (liability for third-party harassment) and 138 (questionnaire procedure), repealed by Enterprise and Regulatory Reform Act 2013, ss. 65-66.

⁵² See Richard Epstein, *Forbidden Grounds*

The Case Against Employment Discrimination Laws (Harvard University Press, 1995).